RECENT CASES

Bankruptcy—Rights Inter se of Reclamation Claimants to Securities Wrongfully Repledged by Bankrupt Stockbroker—Before its bankruptcy, a stockbrokerage firm had wrongfully repledged a large number of customers' securities. One of the pledgees liquidated enough of the securities to satisfy the bankrupt firm's indebtedness to it and returned the surplus to the trustee in bankruptcy. Two groups of customers identified securities which had been held by the pledgee and filed reclamation claims against the returned surplus. The referee's finding that the claims of one group were of superior equity and therefore entitled to satisfaction first, was reversed by the district court in a decree the effect of which was fully to allow the claims of the other group. On appeal, *reversed.* Both groups of claimants are entitled to share in the surplus, and their claims are of equal equity. *Phillips v. Baker,* 165 F. 2d 578 (C. C. A. 5th 1948).

The settlement of the estate in the instant case has been complicated by the conflicting nuances of the rules applicable to stockbrokerage bankruptcies which were developed by the case law prior to 1938. These rules allowed customers of a bankrupt stockbroker who could identify[1] their securities among those held by a pledgee of the broker to share, according to the "equities" of their claims,[2] in whatever remained after the pledgee had satisfied his lien out of the pledged securities;[3] those who were unable to comply with the identification procedure were relegated to the status of general creditors.[4] The widespread dissatisfaction with the prevailing rules[5] led the framers of the Chandler Act to formulate a more workable system of distribution, and to this end subsection (e) was added to § 60 of the Bankruptcy Act,[6] providing a special procedure for stockbrokerage bankruptcies. Under this procedure most[7] of the surplus returned to the trustee in the instant case would go into a "single and separate fund" created by § 60 (e) (2)[8] in which customers of the

1. For the technical requirements that must be met in identifying, or "tracing," securities, see MEYER, STOCK BROKERS AND STOCK EXCHANGES §§ 158-162 (1931).

2. *See, e. g.,* Sexton v. American Trust Co., 45 F. 2d 372 (C. C. A. 8th 1930); *In re* Toole, 274 Fed. 337 (C. C. A. 2d 1921). For an exhaustive treatment of stockbrokerage bankruptcies, see MEYER, *op. cit. supra* note 1, §§ 157-178; see also 3 COLLIER, BANKRUPTCY ¶ 60.72 (14th ed. 1941).

3. A bona fide pledgee for value has a lien on pledged securities superior to the rights of a customer, even where the latter is an outright owner of the pledged securities. Jerome v. McCarter, 94 U. S. 734 (1876); McNeil v. Tenth National Bank, 46 N. Y. 325 (1871); UNIFORM STOCK TRANSFER ACT.

4. Jordahl v. Irving Trust Co., 61 F. 2d 760 (C. C. A. 2d 1932).

5. *See In re* Walter J. Schmidt & Co., 298 Fed. 314, 319 (S. D. N. Y. 1923); *In re* Archer, Harvey & Co., 289 Fed. 267, 272 (D. Md. 1923). See McLaughlin, *Amendment of the Bankruptcy Act,* 40 HARV. L. REV. 341, 383 (1927); Moses, *Stock Brokerage Bankruptcies,* 1 AM. BANKR. REV. 202 (1925); Oppenheimer, *Rights and Obligations of Customers in Stockbrokerage Bankruptcies,* 37 HARV. L. REV. 860, 885 (1924).

6. 30 STAT. 562 (1898), as amended, 11 U. S. C. § 96 (1940).

7. By the terms of § 60(e) (3), if any of the broker's general property contributed to the pledge, a proportionate part of the surplus would go to his general estate.

8. The definition of this fund includes, in general, the property involved in the accounts of customers. However, the punctuation of the text of § 60(e) (2) creates certain ambiguities. See 3 COLLIER, BANKRUPTCY ¶ 60.73 (14th ed. 1941).

bankrupt, as distinguished from general creditors, would share ratably.[9] This surplus, therefore, would be available to all customers of the bankrupt, rather than just to those in the two groups before the court,[10] obviating the problems of attempting subtle adjustments of the rights of claimants *inter se* and resulting in a more equitable distribution of the property involved in the bankruptcy.

The district court had held the Chandler Act inapplicable,[11] without reference to the fact that the Act itself provides that its provisions ". . . shall govern proceedings so far as practicable in cases pending when it takes effect." [12] The validity of the conception of vested rights which has been utilized by some courts in holding it impracticable to apply the Chandler Act to proceedings pending on the effective date of the Act[13] is clearly refuted by decisions allowing application of the Act to make substantial differences in the rights of the parties.[14] It would seem that the test of practicability has been met so long as the estate is *in custodia legis* and the proceedings have not reached the stage where application of the Chandler Act would vitiate them to such an extent that the consequent loss of time, and expense to the estate, would be incommensurate with the advantages to be gained from the use of the new provisions.[15] The vast improvement which § 60 (e) represents,[16] and the probability

9. Under certain circumstances, customers may reclaim securities which remained in the possession of the bankrupt. This limitation on the right of reclamation gives rise to the question whether § 60(e) exceeds the federal bankruptcy power. See 3 COLLIER, BANKRUPTCY ¶ 60.73 (14th ed. 1941). *But cf.* Martin, *Substantive Regulation of Security Devices under the Bankruptcy Power,* 48 COL. L. REV. 62 (1948), questioning the limits of this power.

10. This conclusion is not the only possible interpretation of § 60(e), but it seems most in accord with the purpose of providing a more workable process for distribution of property involved in a stockbrokerage bankruptcy. While the question of distribution of surplus pledged securities under § 60(e) has never reached the stage of reported litigation, at least one referee in bankruptcy has denied reclamation claims under the section on the sole ground that the securities claimed were in the possession of a pledgee of the bankrupt on the date of bankruptcy, so holding despite the fact that some of the securities claimed were returned to the trustee as surplus collateral and were fully identified by their respective claimants. Referee's Order (Claim of Mary A. Taylor), McMillan, Rapp & Co., Bkcy. No. 21225, E. D. Pa., Nov. 26, 1941; Referee's Order (Claim of Dorothy M. Taylor), McMillan, Rapp & Co., Bkcy. No. 21225, E. D. Pa., Nov. 24, 1941. Petitions to the district court to review these orders were withdrawn when the two claims were compromised. Referee's Order (Claims of Mary A. and Dorothy M. Taylor), McMillan, Rapp & Co., Bkcy. No. 21225, E. D. Pa., Dec. 29, 1941. Text writers have also expressed this conclusion. See HANNA AND MCLAUGHLIN, THE BANKRUPTCY ACT OF 1898 AS AMENDED 81 (2d ed. 1947).

11. "[The adjudication of the bankrupt having been made], and the rights of the parties having become fixed, long prior to the Chandler Amendment . . ., I think such Amendment is not applicable here." Matter of Sterling & Baker, Bkcy. Nos. 1936, 1939, S. D. Tex., July 16, 1946. The circuit court of appeals gave no consideration to § 60(e). The bankruptcy occurred Nov. 2, 1937; the Chandler Act was effective Sept. 22, 1938.

12. Section 6(b) of the Act, 52 STAT. 940 (1938), 11 U. S. C. § 1 note (1940).

13. *In re* Raiken, 33 F. Supp. 88 (D. N. J. 1940); *In re* Mid America Co., 31 F. Supp. 601 (S. D. Ill. 1939).

14. Republic Underwriters v. Ford, 100 F. 2d 511 (C. C. A. 5th 1938); *In re* Berg, 33 F. Supp. 700 (D. Minn. 1940); *accord,* Adams v. Bowen, 46 F. 2d 294 (C. C. A. 1st 1931); City of Chelsea v. Dolan, 24 F. 2d 522 (C. C. A. 1st 1928), *cert. denied,* 277 U. S. 606 (1928).

15. *Cf. In re* Old Algiers, Inc., 100 F. 2d 374 (C. C. A. 2d 1938), and especially the oft-cited test of practicability which the court formulated. *Id.* at 375.

16. Since § 60(e) sets old conflicts at rest, it could be applied by analogy even under a holding that the Chandler Act is inapplicable. *In re* Harriman, 31 F. Supp. 50 (S. D. N. Y. 1939).

that it affords a more expeditious procedure,[17] are certainly relevant factors. While it may not be practicable to apply § 60 (e) at the present stage of the proceedings in the instant case, it is submitted that earlier a more serious consideration of this possibility should have been made than was indicated by the district court's opinion. Even now, the burden of showing the impracticability of applying § 60 (e) should be on those who oppose its application.

Constitutional Law—Special Legislation—Pennsylvania's Bituminous Coal Open Pit Mining Act—Plaintiff, engaged in the strip mining of bituminous coal, brought a bill in equity to enjoin enforcement of the Bituminous Coal Open Pit Mining Act of 1945[1] alleging that it was a special law prohibited by the constitution[2] in that it did not apply to the mining industry as a whole. On appeal from a decree adjudging the act constitutional the Supreme Court of Pennsylvania affirmed (Patterson, J., dissenting) holding that there were "substantial and real differences"[3] justifying separate legislation for the bituminous industry. *Dufour v. Maize*, 358 Pa. 309, 56 A. 2d 675 (1948).

Special legislation prohibition, derived from due process and vitalized by the equal protection clause of the fourteenth amendment,[4] reached maturity in Pennsylvania through the constitution of 1874 which prohibits the passage of local or special laws[5] in an enumerated list of subjects of which mining is one.[6] Designed to eradicate eventually the vast number of special laws then on the statute books and to prevent the passage of any further ones, this provision had its significance quickly recognized by the courts as they promised strict enforcement.[7] But while recognized as a valid limitation on the state legislative power it does not preclude

17. In the McMillan, Rapp & Co. bankruptcy, *supra* note 10, the estate was settled in less than four years. Referee's Order Discharging Trustee, McMillan, Rapp & Co., Bkcy. No. 21225, E. D. Pa., Oct 15, 1943.

1. PA. STAT. ANN., tit. 52, § 1396.1-1396.18 (Purdon, Supp. 1946). West Virginia, Ohio, and Indiana have statutes covering open pit or strip mining of coal. See W. VA. CODE ANN., c. 22, art. 2a, § 2461(2) (Michie, Supp. 1947); OHIO GEN. CODE ANN., § 898-203 (Page, Supp. 1947); IND. STAT. ANN., tit. 46, § 1501 (Burns, Supp. 1945). In these statutes no differentiation is made between bituminous and other types of coal.

2. PA. CONST. ART. III, § 7 (1874) provides: "The General Assembly shall not pass any local or special law: . . . Regulating labor, trade, mining or manufacturing."

3. Differences cited in the majority opinion were: There is no evidence that in other stripping operations water has ever been found in a cut, that the operations adjoin a deep mine, or that a vein of coal was left exposed at the bottom of the cut. Therefore, "in this type of mining there is not the same danger of fire, flooding or interruption of ventilating systems of deep mines, as exists in the strip mining of bituminous coal. Also, anthracite coal has a higher combustion point than bituminous coal. These are substantial and real differences which, in our opinion, justify the classification made by the act."

4. U. S. CONST. AMEND. XIV. See MOTT, DUE PROCESS OF LAW 256 *et seq.* (1926) for the historical growth of the equal protection clause.

5. See note 2 *supra*.

6. See SANDERSON, VALIDITY OF STATUTES IN PENNSYLVANIA 95 *et seq.* (1898) for a complete treatment of this provision as applied by the courts in early cases.

7. Morrison v. Bachert, 112 Pa. 322, 5 Atl. 739 (1886).

classification [8] necessary in the public interest [9] if based on genuine and substantial differences; [10] and provided further that the differences which are made the basis of the classification are closely related to the purpose of the statute.[11] Differences making classification valid for one purpose may furnish no reasonable ground for classification under other circumstances.[12] As each case arises the distinctions made the basis for classification must be considered in the light of the evil which the legislature sought to remedy. In the instant case the differences between bituminous operations and those involving other minerals concerned the prevention of fire and the flooding or the interruption of the ventilating systems of deep mines; there was only a secondary relation to the primary purpose of the act which is the conservation and improvement of the land [13] through the planting of trees, shrubs and grasses. Even conceding that the differences shown justify classification for purposes of backfilling and covering the exposed coal vein [14] it appears extremely doubtful that they justify separate legislation for the bituminous industry in the levelling of the spoil bank in such a manner to facilitate planting, and in the actual planting.[15]

Possibly moved by the urgent need for remedial legislation in an industry which has turned west and central Pennsylvania literally upside down, the court in upholding the statute exemplified the tendency of courts to exercise judicial self-restraint in the realm of economic regulation.[16] Although great latitude must be granted to the legislature in its exercise of the police power, nevertheless, there can be no justification for classification on the theory that bituminous strippings are more extensive or conspicuous [17] than other strippings when the latter present the same evils which are sought to be remedied. In accepting the differences proven as "substantial" without a correlation to the primary purpose or object of the statute, the court has permitted an inroad to be made on the special legislation prohibition. The dangers inherent in such a decision are evident.

8. Durkin v. Kingston Coal Co., 171 Pa. 193, 33 Atl. 237 (1895).

9. Ayars' Appeal, 122 Pa. 266, 16 Atl. 356 (1886); Commonwealth v. Gilligan, 195 Pa. 504, 46 Atl. 124 (1900).

10. Seabolt v. Commissioners, 187 Pa. 318, 41 Atl. 22 (1898).

11. Commonwealth v. Casey, 231 Pa. 170, 80 Atl. 78 (1911).

12. Commonwealth v. Alden Coal Co., 251 Pa. 134, 96 Atl. 246 (1915).

13. The title of the act states that it is an act, "providing for the conservation and improvement of land affected in connection with the mining of bituminous coal by the open pit mining method. . . ." The legislative history indicates that the primary purpose of the act was the recovery of the soil through the planting of trees, etc.

14. However, note that the Anthracite Strip Mining Law of 1947, PA. STAT. ANN., tit. 52, § 681.1-681.22 (Purdon, Supp. 1947) requires backfilling, drainage, and the coverage of the exposed vein of anthracite coal with only slight variation from the bituminous requirements. Also, in a letter of Feb. 24, 1948, the U. S. Bureau of Mines states that "the problem of water remaining in a cut is common to all types of strip mining."

15. The Anthracite Act lends support to this contention since it requires the levelling and rounding off of peaks and ridges of the spoil banks and planting if the Secretary of Forests and Waters finds that such is likely to succeed.

16. See 56 YALE L. J. 1276 (1947) n. 22, for a citation of cases in which the Supreme Court of the United States showed a deference to state legislation in the area of economic regulation.

17. In the instant case the court stated: ". . . there is authority for the proposition that when an evil is conspicuously in need of correction, action may be taken, although other evils exist which are not corrected." However, the cases relied on in support of the proposition were all distinguishable from the instant one inasmuch as in the former cases all similarly situated were subject to the various statutes.

Contracts—Liquidated Damages in Government War Procurement Contract—Under authority of the Lend-Lease Act,[1] the United States contracted with petitioner for delivery of a quantity of dried eggs to the Federal Surplus Commodities Corporation. Paragraph 9 of the agreement set forth a scale of "liquidated damages" payable on failure to deliver. Paragraph 7 called for payment of the same "liquidated damages" upon vendor's failure to have specified quantities of eggs inspected and ready for delivery by the date fixed in the offer. On May 18, 1942, the first day on which FSCC could have requested delivery, petitioner had not had eggs inspected. By May 22, inspection had been made, and on May 26, FSCC made its first request for delivery. Petitioner made timely shipments pursuant to instructions, but FSCC, on ascertaining that petitioner's certificates had been issued after May 18, deducted from the price ten cents per pound, on the theory that petitioner's default had put in operation the provisions of paragraph 7. From an adverse decision in the Court of Claims in a suit to recover the amount withheld, petitioner appealed to the Supreme Court, where it was held, four justices dissenting,[2] that the clause in question was a penalty and therefore unenforceable against petitioner. *Priebe & Sons, Inc. v. United States,* 68 Sup. Ct. 123 (1947).

If, as the majority opinion contends, the principles of general contract law must be applied to the construction of government contracts when Congress has not adopted a different standard, then the result of the instant case is unimpeachable. For the fundamental distinction between liquidated damages and a penalty is the reasonable relation which the sum agreed on bears to any probable damage, judged at the time of the execution of the contract, which may follow a breach.[3] Since the government could have been harmed only by a failure to deliver upon request,[4] and since damages for such failure were fully covered by paragraph 9, the clause in question could not be upheld as a reasonable forecast of probable damages. But the bland assertion that general contract principles are applicable in the absence of an express congressional mandate to the contrary does not stand up under close inspection. The proposition is often set forth in the decisions,[5] but there are well recognized exceptions, in all of which, however, the element of damages to the government is apparent.[6] Aside from these cases, different standards are applied to the

1. 55 STAT. 31 (1941), 22 U. S. C. § 411 (Supp. 1946).

2. Mr. Justice Black and Mr. Justice Murphy argued that the contract was to be interpreted, not in terms of "elusive and uncertain principles of 'general contract law'," but in terms of congressional enactments which make liquidated damage clauses mandatory in certain types of government contracts. Mr. Justice Frankfurter and the Chief Justice, while agreeing that the clause should be stricken down as a penalty in a peacetime government contract, maintained that congressional authorization to include penalties in war contracts could be inferred from the unrestricted power given to the President to procure essential war materials.

3. Wise v. United States, 249 U. S. 361, 365 (1919); 3 WILLISTON, CONTRACTS § 776 (rev. ed. 1936).

4. The argument of Mr. Justice Black (instant case at 128) that timely obtaining of the inspection certificates would have enabled the government to prepare shipment time tables would be valid only if the contract had required notice to the government that the certificates had been obtained.

5. Lynch v. United States, 292 U. S. 571, 579 (1934).

6. Wisconsin Central R. R. v. United States, 164 U. S. 190 (1896) (government may recover money paid under mistake of law); United States v. Kirkpatrick, 9 Wheat. 720, 735 (U. S. 1824) (defense of laches or neglect of duty unavailable against government); Utah Power & Light Co. v. United States, 243 U. S. 389, 409 (1917) (defense of estoppel based on unauthorized acts of government agents unavailable against government).

amendment of government contracts than to the amendment of those between private persons.[7] And, especially in war time, a contract which might in peace be held void for uncertainty, will be sustained.[8]

Furthermore, the atypical nature of government war contracts calls for a liberal interpretation of procurement statutes. It is essential during hostilities that the government have some control over the conduct of its industries. It cannot regulate business potential, as it does manpower, through the device of conscription, because the urgency of its needs cannot be fulfilled by a recalcitrant organization.[9] The economic pressure of an enforceable penalty clause would be an effective control, and could have been preserved in the instant case without the radical break with the past that the majority feared.

Estate Taxation—Undistributed Income of Irrevocable Trust Created in Contemplation of Death Not Includable in Estate of Deceased Grantor for Purpose of Measuring Estate Tax—At age 81, decedent created an irrevocable trust for the sole benefit of his incompetent son, retaining no powers of change whatsoever. The trustee was empowered to distribute, in his discretion, such income as necessary to provide for the reasonable needs of the son. At the settlor's death the corpus was swelled by undistributed income from the original gift which was intact and by stocks and bonds purchased from undistributed accumulated trust income. The commissioner in determining a deficiency on the ground that the transfer was in contemplation of death,[1] included in the estate of the decedent all the trust property at the date of death. Though finding that the transfer was in contemplation of death, the Tax Court held that the taxable estate includes that property only which the decedent actually *transferred,* valued at the date of death, and that the commissioner erred in including the accumulated income. *Estate of James E. Frizzell v. Commissioner,* 9 T. C. No. 130 (November 28, 1947), CCH TAX CT. REP. (REG.) DEC. 2720 (1947).

Though increases in value of trust corpus through reinvestment of proceeds from the original property transferred in contemplation of death and appreciation of that property have been held includable in the gross estate of the grantor-decedent,[2] the precise question as to whether accumulations of trust income (as distinguished from capital gains) are so includable is of first impression.[3] However, in *Igleheart v. Commis-*

7. See Kramer, *Extraordinary Relief for War Contractors,* 93 U. OF PA. L. REV. 357, 371 (1945).

8. See Hotchkiss, *Some Effects of Aircraft War Procurement Contracts on the Law of Contracts,* 31 VA. L. REV. 316 (1945).

9. For a common sense recognition that the government can be under factual compulsion, see Mr. Justice Frankfurter's dissent in United States v. Bethlehem Steel Corp., 315 U. S. 289, 314 (1942).

1. INT. REV. CODE § 811(c).

2. Igleheart v. Commissioner, 77 F. 2d 704 (C. C. A. 5th 1935); *In re* Kroger's Estate, P-H 1943 TC MEM. DEC. SERV. ¶ 43,392 at p. 1244 (1943), *aff'd,* 145 F. 2d 901, 907 (C. C. A. 6th 1944), *cert. denied,* 324 U. S. 866 (1945); *accord,* Schoenheit v. Lucas, 44 F. 2d 476, 490 (C. C. A. 4th 1930); Attorney-General v. National Trust Co., [1931] A. C. 818 (P. C.), *reversing,* [1931] O. R. 122; *Re* Payne, Poplett v. Attorney-General, [1940] 2 All Eng. 115.

3. Instant case at 2724, 2725. *See* Frew v. Bowers, 12 F. 2d 625, 628 (C. C. A. 2d 1926); *but cf.,* Attorney-General v. Oldham, [1940] 3 All Eng. 450.

sioner[4] the Board of Tax Appeals did not make a finding as to the mode by which the trust corpus was enhanced[5] and was upheld[6] in its ruling that "the *value* of the *assets* of the two trusts at the time of the decedent's death should be included."[7] In the same case, the court declared that for purposes of the estate tax, the property transferred in contemplation of death should be treated as remaining in the ownership of the grantor until his death.[8] Both the statement of the rule and the test given in the *Igleheart* case appear to lead to a result *contra* to the decision of the instant case. But in *Helvering v. Hallock*,[9] the Supreme Court had said, in preamble to a far different problem, that with reference to § 302 (c) (the forerunner of § 811 (c))[10] the *inter vivos transfer* is the taxable event.[11] This the Tax Court considered decisive authority for distinguishing accumulated income from appreciation of property actually transferred. Though indeed the estate tax is a tax on a transfer,[12] the Supreme Court had earlier disparaged such a conceptual argument as would restrict the word "transfer" in the statute so as to refer only to the passing of particular items of property directly transferred.[13]

Obviously the estate tax cannot be effective without supplemental authority to tax those *inter vivos* transfers which substitute for testamentary dispositions and would otherwise avoid the death tax.[14] The provision for taxing transfers in contemplation of death is such an authority.[15] Though there is no doubt that Congress may prescribe that property so transferred be treated as remaining within the taxable estate of the grantor-decedent to prevent the avoidance of a lawfully imposed tax, it may be argued that the power is limited by the necessity.[16] The inclusion or exclusion in the estate of the decedent of increases in value to the trust corpus solely on the basis of the source of the increase hardly explores that necessity. Clearly the "policy of taxing such gifts *equally* with testamentary dispositions, for which they may be substituted, . . ."[17] requires that income accumulated at the express direction of the grantor and not to be distributed until his death, be included in his estate. Antithetically, mandatory gifts of trust income should not be included.[18] Collaterally,

4. 28 B. T. A. 888 (1933).

5. Though the court in the instant case at 2724 refers to a finding by the Board of Tax Appeals in the *Igleheart* case that there was a reinvestment of trust corpus, no such finding appears in the record and, in fact, the dissenting judge points out: ". . . how the difference of $108,375 was added to the trust fund . . . by the trustee, contributions . . ., or by the general rise in the market . . ., or otherwise, is not shown in the evidence and the findings of fact." *Id.* at 913.

6. Igleheart v. Commissioner, 77 F. 2d 704 (C. C. A. 5th 1935).

7. *Id.* at 711. (Italics supplied.)

8. *Ibid.*

9. 309 U. S. 106 (1940).

10. See note 1 *supra.*

11. Helvering v. Hallock, 309 U. S. 106, 111 (1940). Quoted by the Tax Court, instant case at 2726.

12. *See* U. S. Trust Co. v. Helvering, 307 U. S. 57, 60 (1939); PAUL, FEDERAL ESTATE AND GIFT TAXATION § 1.05 (1942).

13. Chase National Bank v. United States, 278 U. S. 327, 337 (1929).

14. *See* Heiner v. Donnan, 285 U. S. 312, 314 (1932); PAUL, FEDERAL ESTATE AND GIFT TAXATION § 7.05 (1942).

15. *See* Heiner v. Donnan, *supra* note 14 at 330; PAUL, FEDERAL ESTATE AND GIFT TAXATION § 7.04 (1942).

16. Nichols v. Coolidge, 274 U. S. 531, 542 (1927).

17. Milliken v. United States, 283 U. S. 15, 23 (1931). (Italics supplied.)

18. *See* Whitney v. State Tax Commission of New York, 309 U. S. 530, 539 (1940), wherein Mr. Justice Frankfurter pointed out that the substitution-for-testamentary-disposition test does not in all instances delimit the inclusion in the estate of the grantor of *inter vivos* gifts.

the problem of the taxability of realized capital gains is subject to identical analysis. In between the poles of these relatively easy situations grantors may pose more perplexing problems by stipulating discretionary or contingent powers of distribution to the trustees or by granting rights to compel distribution to beneficiaries.[19] Nevertheless the rule emerges that where the grantor has provided for the "assimilation" into the trust corpus of a particular increase in value by barring its distribution, such increase should be included in the estate of the decedent.[20] But the instant case illustrates the necessity of further inquiry to prevent the effective use of pseudo-powers designed to circumvent the rule.[21]

Evidence—Use of Copy to Refresh Present Recollection Barred by Willful Spoliation of Original—A police officer who tapped a telephone wire, made notes of the incriminating conversations of the accused and thereafter dictated from these notes, was allowed to use the dictated statement to refresh his recollection, although he had destroyed the original notes to escape cross-examination. On appeal from a judgment of conviction, the Appellate Division of the Supreme Court reversed, (one judge dissenting), holding that it was error to allow the officer to refresh his recollection from a writing which purported to be a transcript of original notes willfully destroyed by him to frustrate cross-examination. *People v. Betts,* 272 App. Div. 737, 74 N. Y. S. 2d 791 (1st Dep't 1947).

The court apparently treated the situation as one of present recollection refreshed.[1] Under that doctrine, the evidence offered in proof is the spoken word, the memorandum forming no part of it.[2] The function of the memorandum is to stimulate the memory of the witness so that he can testify from independent recollection. Rationally, the nature, origin or past history of the actuating cause is immaterial.[3] The primary concern is whether the memorandum actually serves the purpose of refreshing recollection. To that end, safeguards are provided to assure the triers of fact that what the witness puts before the court is in fact his recollection and knowledge. The writing must be shown to the opponent on demand for the purpose of inspection and cross-examination based on such inspec-

19. The Tax Court noted (instant case at 2725) that the accumulation was discretionary in this case, but it did not stress that fact as one which would distinguish the case from a case where the accumulation was mandatory.

20. *Cf.* Estate of Daniel Guggenheim, 40 B. T. A. 181 (1939), *aff'd,* 117 F. 2d 469 (C. C. A. 2d 1941), *cert. denied,* 314 U. S. 621 (1941). Accumulated income of *inter vivos* trust (not in contemplation of death) held taxable to estate of grantor because of power of revocation retained by grantor-decedent. This case was distinguished by the Tax Court (instant case at 2726).

21. The findings of fact disclose that the 34 year old incompetent son lived with his parents, obviously of considerable means, who took care of him in every way, thus negating any valid purpose for the discretionary power of distribution *during the life of his parents.*

1. ". . . where, as here, an officer of the law attempts to refresh his recollection from a writing which purports to be a transcript of original [notes] willfully destroyed by him to frustrate cross-examination, the witness should not be permitted to use such a document to aid him." Instant case at 741.

2. Lord Ellenborough formulated the often quoted phrase: "It is not the memorandum that is the evidence but the recollection of the witness." Henry v. Lee, 2 Chitty 124, 125 (1814).

3. Jewett v. United States, 15 F. 2d 955, 956 (C. C. A. 9th 1926).

tion.[4] The jury may also examine it to measure its propriety,[5] but the offering party may not read the memorandum to the jury as substantive evidence.[6] That apparently was done here [7] and, under the court's view that the case was one of present recollection refreshed, could have constituted reversible error.

A candid reading of the case indicates, however, that refreshed memory was not the situation presented. Rather, the case represents the principle of past recollection recorded.[8] There, the witness testifies that he is devoid of present recollection but that he made a contemporaneous memorandum of the facts in question which he now offers as his testimony.[9] If the contents of the writing are to be safely received, limitations are required to guarantee their accuracy. The original may well be demanded as the best evidence of what was really recorded.[10] A copy may be used where the original has been accounted for as unavailable[11] but where there has been a willful destruction of the original, there arises a strong presumption that the document was inimical to the spoliator's cause.[12] The presumption is not conclusive,[13] secondary evidence being receivable if the court finds that the destruction was free from fraudulent design.[14] The trial court's discretion in determining the good faith of the explanation will be final on appeal unless it be shown that the court abused its discretion.[15] In the instant case, the Appellate Division indicated

4. Miller v. Greenwald Petticoat Co., 192 App. Div. 559, 183 N. Y. Supp. 97 (1st Dep't 1920); Richardson v. Nassau Electric Co., 190 App. Div. 529, 180 N. Y. Supp. 109 (2d Dep't 1920).

5. Commonwealth v. Jeffs, 132 Mass. 5, 6 (1882). 3 WIGMORE, EVIDENCE § 763 (3d ed. 1940).

6. In Garber v. New York City Ry. Co., 92 N. Y. Supp. 722 (1905) it was error to read as original evidence a memorandum which was available only to refresh the witness' memory. *Cf.* Berkowsky v. New York City Ry. Co., 127 App. Div. 544, 546, 111 N. Y. Supp. 989 (1st Dep't 1908).

7. The court made no reference to the apparent failure of the clerk who had reproduced the dictated statements to testify to their accuracy as would be required under hearsay evidence principles. In People v. Randazzio, 194 N. Y. 147, 87 N. E. 112 (1909) an analogous situation was presented and a transcript from a stenographer's minutes was held competent where the stenographer swore that the transcript had been compared with the original and that it was correct.

8. Briefs of respondent and appellants both premise the argument on this principle; the former at p. 12, the latter at p. 10. The court did not believe that the witness could recall the details of the conversations and indicated that he admitted as much.

9. In England, this process was recognized in Doe v. Perkins, 3 T. R. 654 (1790). For an early example of the legitimacy of the process in the United States, see Haig v. Newton, 1 Mills Const. Reports 423 (S. C. 1817).

10. "The original paper must be produced . . . or its absence must be accounted for." Mankoff, Inc. v. Erie R. Co., 97 Misc. 415, 417, 161 N. Y. Supp. 346, 347 (1916). Graf v. Weinstein, 161 N. Y. Supp. 337 (1916) (error to read into the record a copy of books of account instead of producing them).

11. People v. Weinberger, 239 N. Y. 307, 146 N. E. 434 (1925); People v. Randazzio, 194 N. Y. 147, 87 N. E. 112 (1909). *See* also People v. Engelbrecht, 260 App. Div. 912 (1st Dep't 1940) as reported in dissenting opinion of the instant case at 744.

12. *In re* Eno's Will, 196 App. Div. 131, 163, 187 N. Y. Supp. 756, 779 (1st Dep't 1921).

13. Tilton v. Iowa Oil Co., 139 Cal. App. 93, 97, 33 P. 2d 446, 448 (1934). "Such explanation [of the destruction] the plaintiff was bound to give affirmatively." Blade v. Noland, 12 Wend. 173, 175 (N. Y. 1834).

14. Dearing v. Pearson, 8 Misc. 269, 271, 28 N. Y. Supp. 715, 716 (1894); Steele v. Lord, 70 N. Y. 280 (1877); *see* Harmon v. Matthews, 27 N. Y. S. 2d 656, 663 (1941).

15. Dearing v. Pearson, *supra* note 14 at 717. *But see* Mason v. Libbey, 90 N. Y. 683, 684 (1882) and Harmon v. Matthews, 27 N. Y. S. 2d 656 (1941).

strongly that the trial court had abused its discretion.[16] It follows from these considerations that by application of the rules called for within the facts, the court could have come to a quick and proper solution.

Considered in the light of the purpose for which the memorandum is used in the situation of present recollection refreshed, the limitations noted are sufficient to provide against the use of false aids. The court here, by resting the case on that doctrine and fusing to it the rule that fraudulent spoliation of an original record bars use of a copy, has added an unnecessary limitation which will likely lead to confusion in future applications of the principle.

Federal Drug Control—Extension of the Food, Drug and Cosmetic Act to Cover an Entirely Intrastate Transaction—A retail druggist, having purchased properly labelled bottles of sulfathiazole from a distributor who imported them from another state, transferred twelve tablets to a box labelled only "Sulfathiazole," and so sold them. Drugs are misbranded, under § 502 (f) of the Federal Food, Drug and Cosmetic Act, unless labelled with directions for use.[1] Section 301 (k) prohibits altering the label, or "any other act" that results in the misbranding of articles "held for sale" after interstate shipment.[2] He was convicted of misbranding drugs. Affirming the conviction, the Supreme Court (three Justices dissenting) decided that "held for sale" extended the prohibitions of § 301 (k) to *all sales* after interstate shipment, thus safeguarding the public "by applying the act . . . all the way to . . . the . . . consumer." *United States v. Sullivan,* 68 Sup. Ct. 331 (1948).

The Act, expressly designed to expand protection given by existing law,[3] has been interpreted liberally in previous decisions.[4] The *Sullivan* case climaxes a policy of lengthening the reach of federal food and drug control, insuring thereby that the ultimate consumer will benefit from the protection given by § 502 (f).[5] However, two important problems raised by the decision were not squarely met. First, the Court regarded the constitutionality of applying § 301 (k) to a second and entirely intrastate sale as settled by the case of *McDermott v. Wisconsin.*[6] The latter case involved labelling on interstate containers and an original sale by an interstate importer. It seems clear, therefore, that, under the accepted doctrine that federal control constitutionally extends to intrastate activity

16. "To say that a police officer in good faith and innocently 'made an error of judgment' when he destroyed documents because he 'didn't wish to be cross-examined about them' is a patent contradiction of terms." Instant case at 742.

1. 52 STAT. 1051 (1938), 21 U. S. C. § 352(f) (1940).

2. 52 STAT. 1042 (1938), 21 U. S. C. § 331 (1940).

3. H. R. REP. No. 807, 80th Cong., 1st Sess. (Committee Print) 3 (1947) (recommending that § 301(k) be amended to read ". . . while held for sale (whether or not the first sale) . . ."); H. R. REP. No. 2139, 75th Cong., 3d Sess. 1, 3 (1938).

4. United States v. Dotterweich, 320 U. S. 277 (1943); United States v. Lee, 131 F. 2d 464 (C. C. A. 7th 1942).

5. 81 CONG. REC. 2019 (1937); SEN. REP. No. 361, 74th Cong., 1st Sess. 19 (1935). For effects of incorrect use of sulfa drugs, see Garvin, *Complications Following the Administration of Sulfanilamide,* 113 J. AM. MEDICAL ASS'N 288-291 (1939).

6. 228 U. S. 115 (1913). This case held that federal labelling requirements included containers removed from a bulk package for the first sale after interstate shipment. Although some language in the opinion might be taken as supporting the instant case, its applicability is doubtful, in view of its distinguishing facts.

directly affecting interstate commerce,[7] the *McDermott* decision does not establish as constitutional the regulations upheld in the instant case. Moreover, since this retail sale affects a product neither destined for interstate commerce nor competing with interstate goods, little support for the decision appears in the theories that have hitherto justified federal intrastate regulation.[8] However, the legislative history of the Act indicates that, because of the complexity and scope of food and drug control, adequate protection cannot be provided unless federal and state supervision are coextensive.[9] Without federal intrastate assistance, transactions such as that in the instant case may go unprevented. Therefore, it could have been validly argued that such activity, rendering useless regulation designed to keep interstate commerce free of articles injurious to life and health, falls within the direct burden rule.

Accepting the constitutionality of § 301 (k), a second problem arises from the fact that it covers equally food, drugs and cosmetics. Thus, if transferring drugs from bulk to retail containers without reproducing the interstate label constitutes "any other act" misbranding drugs, the same seems true of foods. This would place an impractical restriction on grocery sales. Since this act infringes so far on state police power, to say that the Administrator has discretion to disregard "technical infractions,"[10] is not a sufficient limitation on federal control. An interpretation of "any other act" to cover drugs and exclude foods, which is possible within the framework of the statutory language, may provide the necessary limitation.[11]

By summarily dismissing both issues involved, the majority has left a dangerous precedent for unlimited extension of federal power. Future decisions should be careful to confine this case within the indicated limits, on the basis of the peculiar importance of the protection given.

International Law—Effect of State Statute of Limitations on Foreign Sovereigns—Defendant insured plaintiff's ship under a contract whereby losses were to be payable to plaintiff or to Mexico "as their interests might appear." The ship was lost, and plaintiff put in a claim for the insurance. When plaintiff brought a court action, an order was issued allowing defendant to notify Mexico of pending suit. Under the pertinent section of the New York Civil Practice Act[1] this notice started

7. Schechter Poultry Corp. v. United States, 295 U. S. 495, 546 (1935); N. L. R. B. v. Jones and Laughlin Steel Corp., 301 U. S. 1, 37 (1937).

8. The progress of federal expansion can be seen in such cases as Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453 (1938); United States v. Wrightwood Dairy Co., 315 U. S. 110 (1942); Wickard v. Filburn, 317 U. S. 111 (1942).

9. H. R. Rep. No. 807, 80th Cong., 1st Sess. (Committee Print) 6-7 (1947); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 6906, H. R. 8805, H. R. 8941, and S. 5,* 74th Cong., 1st Sess. 85, 103-131 (1935). It should be noted here that this transaction was criminal under the law of the state. Ga. Laws 1939, Part I, tit. VI, No. 184.

10. ". . . the Administrator is given . . . broad discretion . . . to enable him to perform his duties . . . without wasting his efforts on . . . technical infractions of the law." Instant case at 335.

11. A persuasive argument in favor of this interpretation of the Act is made in the concurring opinion. Instant case at 336.

1. N. Y. Civ. Prac. Act § 51a, Note, 14 St. John's L. Rev. 221 (1940), 39 Col. L. Rev. 1061 (1939). After notice has been given the suit may not proceed until the

a one year statute of limitations running against Mexico. After the statute had run, plaintiff renewed the action, Mexico having failed to intervene, but Mexico then appeared specially and moved that the case be dismissed for want of jurisdiction, on the ground that Mexico, an immune foreign sovereign,[2] was an indispensable party. The court held that Mexico was neither an indispensable nor even a proper party, describing the action as merely a dispute *in personam* on a debt between the plaintiff ship company and the insurer, any disposal of which would not prevent Mexico from establishing a separate claim against the insurer in a subsequent suit. The court denied Mexico's further motion that the order allowing defendant to give notice be vacated, as a form of process, on the ground that the notice given had none of the "attributes or effects of process" on an immune sovereign. *Federal Motorship Corp. v. Johnson and Higgins,* 119 N. Y. L. J. 391 (Sup. Ct. Jan. 30, 1948).

The holding that Mexico was not a proper party to this suit in itself was sufficient to dispose of the case. The attention given to the statute of limitations would consequently be relevant to the actual decision only if the primary holding were overturned, and it would have certainly been more expeditious to decide the nature of the action before the statute was put into operation originally. The purpose of such a short and unique statute of limitations is to foreclose, at least in the jurisdiction of its enactment, any future claims against the defendant on the same cause of action, and so to circumvent the unavailability of the indispensable party. This is its sole utility for the defendant. The court's discussion of its applicability to Mexico is significant, as an indication of a willingness to apply limitation statutes to foreign sovereigns in the face of immunity claims. It has long been the American law that neither the United States[3] nor the individual states[4] are subject to statutes of limitations unless included therein by express provisions. Founded on the concept of the dignity of the sovereign,[5] the rule has been retained on the theory that the public rights should not suffer from the negligence of government officials who have failed to act promptly.[6] Until a few years ago there was considerable doubt as to whether forum statutes of limitations applied to foreign sovereigns. The only decision on the point held that Italy was bound by a New York statute but there was no opinion handed down.[7] Supreme Court dicta had expressed doubt that the im-

notified party intervenes or until the statute runs. This substitute for interpleader became law in 1939 when there was danger of double liability in connection with property held for those in conquered countries. For problems of interpleader where there is no jurisdiction over one of the parties to be interpleaded, see Chafee, *Interstate Interpleader,* 33 YALE L. J. 685 (1924).

2. The general rule that a foreign sovereign is immune from suit is well established. The Schooner Exchange v. McFaddon, 7 Cranch 116 (U. S. 1812); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24 (1923), *error dis.* 266 U. S. 580 (1924); *Research in International Law, Harvard Law School, Draft Convention,* 26 AM. J. INT'L. L. 455, 456 and comment at 527 (1932).

3. United States v. Thompson, 98 U. S. 486 (1876); United States v. Nashville C. and St. L. Ry., 118 U. S. 120 (1886); Davis, Director General of Railroads, as Agent of the United States v. Corona Coal Company, 265 U. S. 219 (1924).

4. Florida C. and P. Ry. v. Reynolds, 183 U. S. 471 (1902).

5. Magdalen College Case, 11 Coke 66b, 68b (1616); WATKINS, THE STATE AS PARTY LITIGANT 33 (1927).

6. *See* United States v. Hoar, 2 Mason 311, 314 (C. C. D. Mass. 1821); Guaranty Trust Co. v. United States, 304 U. S. 126, 132 (1938).

7. Royal Italian Government v. International Committee of the Y. M. C. A., 273 N. Y. 468, 6 N. E. 2d 407 (1936). In this case plaintiff had allowed 16 years to elapse since the right of action had arisen.

munity should be extended to foreign sovereigns,[8] and finally in 1938 the Court held, in *Guaranty Trust Co. v. United States,*[9] that a six year statute did preclude a suit based on a foreign government's claim when the one representing that government was party plaintiff. The statute there involved, like the one in the principal case, started running only on notice. The Court's reasoning was that a foreign sovereign sues as a matter of comity and is thus subject to the rules of the forum. Although in the instant case Mexico was resisting being brought into the suit, the same reasoning would apply.

A rule that foreign sovereigns must come in and contest within a reasonable period claims of which their interest is preventing the adjudication, on penalty of being foreclosed, would protect residents against stale claims without requiring more of the foreign sovereigns than is required of other claimants. The serious drawback to the New York statute is that it may be effective to foreclose suit only in New York and may not be too salutary to a defendant with multi-state contacts who can be caught elsewhere.

International Law—Salary of League of Nations Employee Not Excluded From Gross Income for Tax Purposes—Petitioner, a New Zealand citizen employed by the League of Nations, entered the United States in 1940 with 19 other League officials to continue work disrupted in Geneva by the war. Funds contributed by member-nations to support the League were used to pay Petitioner for his services, which consisted of accounting and statistical compilation. An application that this salary be exempt from income taxation, as is that of foreign government officials,[1] was rejected, and the Tax Court affirmed a finding by the Commissioner of Internal Revenue that Petitioner was deficient in tax payments. *John Henry Chapman v. Commissioner,* 9 T. C. No. 87 (Oct. 9, 1947), CCH TAX CT. REP. (REG.) DEC. 2501 (1947).

Although under customary international law immunity from local sovereignty is extended to foreign diplomats in the nation to which they are sent,[2] it is not true that all international representatives necessarily enjoy this privilege.[3] Usually diplomatic immunity is limited to those who are properly authorized, received, and accredited as members of their government's embassy or legation.[4] Non-diplomatic officials, such as consuls, are presumably subject to the jurisdiction of the territory,[5] and any privileges they enjoy result from treaties and not from general international law or custom.[6] The League expressly provided for diplo-

8. *See* French Republic v. Saratoga Vichy Spring Co., 191 U. S. 427, 437 (1903). *But cf.* United States v. Nashville, C. and St. L. Ry., 118 U. S. 120, 125 (1886).

9. 304 U. S. 126 (1938), Note, 32 AM. J. INT'L. L. 542 (1938), 26 CALIF. L. REV. 713 (1938).

1. Revenue Act of 1942, § 149(a), 56 STAT. 842 (1942).

2. *Instructions to Diplomatic Officers of the United States,* c. VII-1 (1927), reprinted in PFANKUCHEN, A DOCUMENTARY TEXTBOOK IN INTERNATIONAL LAW 415 (1940).

3. Auer v. Costa, 23 F. Supp. 22 (D. C. Mass. 1938).

4. Carbone v. Carbone, 123 Misc. 656, 206 N. Y. Supp. 40 (Sup. Ct. 1924).

5. *In re* Baiz, 135 U. S. 403 (1890).

6. *Legal Position and Functions of Consuls* in RESEARCH IN INTERNATIONAL LAW 201, 214 (Harv. Law School 1932), 26 AM. J. INT'L L. 201, 214 (Supp. 1932).

matic immunity for its representatives,[7] but the United States, despite instances of cooperation,[8] had refused to be bound by the Covenant.[9] Petitioner's position was almost like that of a diplomat in a country to which he was not accredited.[10] In the past League representatives in the United States were treated as distinguished visitors, *i. e.,* given custom courtesies, free entry privileges, and protection as requested,[11] all of which is short of recognition of diplomatic or non-diplomatic status. It is not unnatural that the Treasury hesitated to accord Petitioner special immunity despite his argument that the League was not a state[12] and that since member nations contributed the funds from which he was paid, he should be considered a tax-free employee of those governments.

Foreign[13] representatives to the United Nations will not be bothered with the problem from the tax standpoint as the Internal Revenue Code has been amended to exclude their official salaries in figuring gross income.[14] But the broader aspect of the question, that is, the scope of the immunity to be extended to UN representatives and to which officials, remains unanswered.[15] The UN Charter, less ambitious than the comparable League provision, requires only such immunity for its officials as may be necessary for the exercise of their functions with the Organization.[16] Plainly this is short of diplomatic immunity. Since the Charter is apparently not considered self-executing,[17] a national law like the International Organizations Immunities Act[18] is required to implement it. For this reason the League standard was more desirable. Tradition and case law have molded "diplomatic immunity" into a well defined concept.

7. COVENANT OF THE LEAGUE OF NATIONS Art. 7.

8. One example was under the so-called Neutrality Act of 1935, 49 STAT. 1081 (1935). Under this law, President Roosevelt prohibited exports of war materials to Italy and Ethiopia, directly supporting League sanctions. See also I HACKWORTH, DIGEST OF INTERNATIONAL LAW 335-336 (1940).

9. 48 STAT. 1183 (1934), 22 U. S. C. § 272 (1940).

10. Instant case at 2505; see note 2 *supra;* IV HACKWORTH, DIGEST OF INTERNATIONAL LAW 539 (1942). But see *id.* at 460.

11. To the effect that agents of the League were not comprehended in the definition of diplomatic officers in 38 STAT. 806 (1915), 22 U. S. C. § 40 (1940), see the communication of Oct. 16, 1933, from the Under Secretary of State (Phillips) to the Turkish Ambassador (Muhtar) quoted in IV HACKWORTH, *op. cit. supra,* at 422. Diplomatic privileges were not extended to representatives of the Pan-American Union at this time. *Cf.* THE CONVENTION FOR THE SETTLEMENT OF INTERNATIONAL DISPUTES, THE HAGUE 1907 Art. XLVI, an agreement signed by the United States.

12. LEAGUE OF NATIONS, OFFICIAL JOURNAL 21 (1920); Rex v. Christian, [1924] Juta's So. Afr. Rep., App. Div., 101, 136; I HACKWORTH, DIGEST OF INTERNATIONAL LAW 50 (1940).

13. U. S. citizens are specifically excluded from the Act. Apparently it is considered unwise to set up a tax-free occupational group among U. S. nationals.

14. INT. REV. CODE § 116(h). The fact that the law has been changed to exclude UN members supports the Court's finding that petitioner's income was not to be excluded.

15. For background material on this problem see HILL, IMMUNITIES AND PRIVILEGES OF INTERNATIONAL OFFICIALS (1947), reviewed in 96 U. OF PA. L. REV. 446 (1948). For a recent case involving the same question see Westchester County v. Ranollo, 187 Misc. 777, 67 N. Y. S. 2d 31 (City Ct. 1946).

16. CHARTER OF THE UNITED NATIONS c. XVI, Art. 105.

17. The United States and the United Nations have signed an agreement regarding the UN headquarters. Art. V, § 15 provides for certain immunities for representatives. Pub. L. No. 357, 80th Cong., 1st Sess. (Aug. 4, 1947). See also CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, UNITED NATIONS, JOURNAL OF THE GENERAL ASSEMBLY, FIRST SESSION, 687-93 (1946).

18. 59 STAT. 669, 22 U. S. C. 288 (Supp. 1946). Preuss, *The International Organizations Immunities Act,* 40 AM. J. INT'L L. 332 (1946).

On the other hand, "immunity necessary for effective work" may be limited from the start by the interpretations of national governments which may or may not be in complete sympathy with the international mission within their borders. So restricted the term may have little significance and the freedoms it guarantees prove to be illusory.

Labor Law—Attorneys Employed by Insurance Company Eligible for Representation by Rank-and-File Union Under Taft-Hartley Act—In a National Labor Relations Board representation proceeding, the Independent Insurance and Banking Employees Union, an unaffiliated organization which admits to membership all persons employed "in all branches of the insurance and banking industry," [1] petitioned for exclusive collective bargaining rights with respect to eleven attorneys employed by a casualty insurance company. Salaried at $1,500 to $3,000 per year, these attorneys are not vested with the discretion ordinarily reposed in the lawyer by his client. They may exercise their legal judgment only within the narrow confines staked out by company policies. In predetermined types of cases a jury trial is never to be requested, and in particular fact situations certain affirmative defenses are always to be pleaded, such as the defense of contributory negligence in every action involving the death of a plaintiff. The attorneys may not settle cases upon their own initiative, are not attorneys of record, and litigate only those claims which involve less than $3,000. They are hired in the same manner as other company employees, are required to keep the same hours, are subject to the regular wage deductions and receive vacations based upon length of service. In ordering a representation election for the lawyers as a separate unit, the Board refused to "deprive these attorneys of their right to be represented by a labor organization for the purposes of collective bargaining, even though the labor organization admits non-professional employes to membership." *Lumbermen's Mutual Casualty Co.*, 75 N. L. R. B. No. 129 (Jan. 30, 1948), 1 CCH LAB. LAW SERV. ¶ 6336 (1948).

Under the Wagner Act,[2] the Board frequently certified labor organizations as the bargaining representatives of professional employees,[3] and at least insofar as professional employees were concerned, had consistently followed the *Globe* [4] doctrine of placing such personnel either in separate or industrial units, depending upon the desires of the employees themselves as expressed in separate self-determination elections.[5] The Taft-Hartley Act [6] endorses this policy of the Board by defining pro-

1. CONST. AND BY-LAWS, Independent Insurance and Banking Employees Union, Art. I, §§ 2, 3, Art. II, § 3.

2. 49 STAT. 449 (1935).

3. Spicer Mfg. Corp., 55 N. L. R. B. 1491 (1944); Boston Edison Co., 51 N. L. R. B. 118 (1943); Wagner Electric Corp., 67 N. L. R. B. 1104 (1945); Aluminum Corp. of America, 62 N. L. R. B. 318 (1945).

4. Globe Machine and Stamping Co., 3 N. L. R. B. 294 (1937).

5. Lockheed Aircraft Corp., 58 N. L. R. B. 1188 (1944); Radio Corp. of America, 57 N. L. R. B. 1729 (1944); Great Lakes Terminal Warehousing Co., 21 N. L. R. B. 580 (1940).

6. 61 STAT. 136, 28 U. S. C. A. § 151 (Supp. 1947).

fessional employees [7] and establishing for them in the law itself [8] the *Globe* doctrine of self-determination.[9]

In finding that the relationship of these attorneys to the insurance company was more like that between employer and employee than one between lawyer and client, the Board cast aside objections [10] by the committees on legal ethics of three bar associations. Certainly the evidence supports the Board's conclusion. That attorneys are officers of the court and fiduciaries does not render less valid the proposition that there is nothing inconsistent between self-organization for collective bargaining and faithful service to the employer.[11] The bar association opinions evince concern over the possible effect of strikes upon the duty of an attorney not to withdraw from employment except for good cause.[12] Apparently overlooked was that trial postponements have been granted for reasons less cogent than labor disputes. Urging that an attorney must not permit the interests of any lay agency to intervene between him and his client,[13] but faced with the fact that these attorneys represent holders of casualty insurance policies when they are indeed salaried employees of the insurer, the American Bar Association opinion attempts a reconciliation with Canon 35 [14] by finding that "essentially the interests of the insured and the company are identical." Such reasoning is more surprising than it is convincing; the identity created by subrogation in law is not to be so glibly equated with identity of interest in fact. The attempt of these attorneys to better their economic status by affiliation with a lay organization might well indicate a definite shortcoming in the bar associations. Their opposition to unionization of attorneys would be more effective if they themselves promoted legitimate economic aspirations and realized that codes of ethics are inescapably linked with standards of living.

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7. "Sec. 2(12). The term 'professional employee' means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning. . . ."

8. Sec. 9(b) provides that "the board shall not (1) decide that any unit is appropriate for such [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . . ."

9. See CONFERENCE REPORT, LABOR-MANAGEMENT RELATIONS ACT, H. R. REP. No. 510, 80th Cong., 1st Sess., 47 (1947).

10. For subsequently issued opinions outlining the stand taken by the bar associations, see OPINION 275 (Sept. 20, 1947), Standing Committee on Professional Ethics and Grievances, Am. Bar Ass'n.; Opinion of the Committee on Professional Ethics of the Ass'n. of the Bar of the City of N. Y. (Ref. No. 964), issued jointly with the N. Y. County Lawyers Ass'n., published in THE RECORD OF THE ASS'N. OF THE BAR OF THE CITY OF N. Y., Vol. 2, No. 5 (May, 1947).

11. Bethlehem-Alameda Shipyard, 59 N. L. R. B. 1525, 1527 (1945).

12. CANONS OF PROFESSIONAL ETHICS, Am. Bar Ass'n., Canon 44: "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause."

13. CANONS OF PROFESSIONAL ETHICS, Am. Bar Ass'n., Canon 35: "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. . . ." Hereafter cited as Canon 35.

14. *Supra* note 13.

Labor Law—Fair Labor Standards Act—Applicability to Employees Producing War Materials Under Cost-Plus Contracts—The employees of a corporation which had operated a shipyard and built ships under a cost-plus contract sued for and recovered overtime, liquidated damages and attorneys' fees under the Fair Labor Standards Act of 1938.[1] The shipyard, tools, materials, and the vessels at all stages of construction were the property of the United States. On appeal, the court held that while the employees who had worked on Liberty Ships were covered by the Act, those who had worked on combat tankers were not, as such employees were not "producing goods for commerce." (Two judges dissenting.) *St. Johns River Shipbuilding Corporation v. Adams,* 164 F. 2d 1012 (C. C. A. 5th 1948).

There is substantial disagreement among the circuits as to whether employees who worked under cost-plus contracts for the production or processing of war materials are within the provisions of the Act.[2] In general, those courts which have denied recovery have used two bases for their decisions: (1) the contractor was an agent of the United States, his employees were Government employees and thus exempt,[3] and (2) the employees were not engaged in the production of goods for commerce. The basis of Government agency has, at best, weak support,[4] and was not pleaded by the defendant in the instant case. The court rested its decision on the commerce theory and distinguished between Liberty Ships and combat tankers on the grounds that there was an expectation of utilizing the Liberty Ships as vehicles of commerce, while there was no such expectation for the combat tankers. This seems to misinterpret the Act's definition of "commerce."[5] One test of whether goods are produced for commerce is the expectation of the producer that the goods will be shipped across State lines.[6] The same court, while denying recovery to another group of employees producing munitions on the grounds that the employer was a Government agent, stated that if the employer had been an independent contractor, as in the instant case, and had shipped the munitions across State lines, the employees would have been covered.[7] It is difficult to determine how the court can justifiably distinguish between munitions and combat tankers. In view of the statutory language, the introduction of the requirement that the ships possess a "commercial" use is unduly restrictive. Certainly, previous statutes and judicial decisions have included other situations far removed from a strictly "commercial" concept within "commerce."[8] Other courts, when faced with this same general problem,[9] have concluded that since the Government

1. 52 STAT. 1060 (1938), 29 U. S. C. § 201 (1940).

2. *Granting recovery:* Bell v. Porter, 159 F. 2d 117 (C. C. A. 7th 1946), *order granting cert. vacated,* 330 U. S. 813 (1947); Clyde v. Broderick, 144 F. 2d 348 (C. C. A. 10th 1944). *Denying recovery:* Divins v. Hazeltine Electronics Corp., 163 F. 2d 100 (C. C. A. 2d 1947); Kennedy v. Silas Mason, 164 F. 2d 1016 (C. C. A. 5th 1948).

3. 52 STAT. 1060 (1938), 29 U. S. C. § 203(d) (1940).

4. For an excellent criticism of this rationale, see 60 HARV. L. REV. 656 (1947).

5. 52 STAT. 1060 (1938), 29 U. S. C. § 203(i) (1940). "'Commerce' means trade, commerce, *transportation,* transmission or communication among the several States or *from any State to any place outside thereof.*" (Emphasis added.)

6. See the most recent interpretation of the Act by the Wage and Hour Administrator, 20 LAB. REL. REP. (Wages and Hours) 3027, 3029 (1947).

7. *See* Kennedy v. Silas Mason, 164 F. 2d 1016, 1017 (C. C. A. 5th 1948).

8. Edwards v. United States, 314 U. S. 160 (1941) (transportation of people across State lines); United States v. Hill, 248 U. S. 420 (1919) (whiskey for personal consumption); Caminetti v. United States, 242 U. S. 470 (1917) (transportation of women across State lines for immoral purposes).

9. Divins v. Hazeltine Electronics Corp., 163 F. 2d 100 (C. C. A. 2d 1947); Barksdale v. Ford, Bacon & Davis, 70 F. Supp. 690 (E. D. Ark. 1947).

takes possession at the point of manufacture and is the ultimate consumer, the materials are not goods within the meaning of the Act.[10] This rationale ignores the purpose of excepting the ultimate consumer, namely, to protect the innocent purchaser of goods manufactured in violation of the provisions of the Act,[11] and its consequent inapplicability to this general fact situation.

Judicial reluctance to approve the payment of overtime to workers for producing goods while the men who used them were subjected to the rigors of battle[12] completely confuses standards and subverts the purposes of the Act.[13] The belief of a subsequent Congress that these workers were covered by the Act is indicated by the Portal-to-Portal Pay Act, which was designed, *inter alia,* to prevent suits for "walking time" under the Fair Labor Standards Act because of the cost to the Public Treasury for war contracts *previously* entered into by the Government.[14] Since these employees obtained no civil service benefits, since the Fair Labor Standards Act is remedial and is to be liberally construed, and since there is no incontrovertible dogma which prohibits recovery, their inclusion within the Act has much to recommend it.

Motor Carriers—Minor Portion of Total Services in Interstate Commerce—Drivers Subject to ICC to Exclusion of Fair Labor Standards Act—Petitioner operated a general cartage business as common carrier by motor vehicle, and as such was engaged in the "production of goods for commerce," within the meaning of the FLSA.[1] Four percent of his services were directly in interstate commerce, distributed generally throughout the year and shared by all the drivers indiscriminately. The latter were paid their regular rate for overtime on the assumption that they were subject to regulation by the ICC, and that therefore the overtime provisions of the FLSA did not apply to them.[2] The

10. 52 STAT. 1060 (1938), 29 U. S. C. § 203(c) (1940). "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part thereof, but does not include goods after their delivery into the actual possession of the ultimate consumer thereof, other than producer, manufacturer, or processor thereof."

11. *See* Chapman v. Home Ice Co., 163 F. 2d 353, 355 (C. C. A. 6th 1943), *cert. denied,* 320 U. S. 761 (1943); see also Wage and Hour Administrator's analysis, 20 LAB. REL. REP. (Wages and Hours) 3027, 3031 (1947).

12. Instant case at 1015. "The men who manned these boats got no overtime. They staked and often lost their lives." *See also* Kennedy v. Silas Mason, 164 F. 2d 1016, 1018 (C. C. A. 5th 1948); Stewart v. Kaiser, 71 F. Supp. 551 (D. Ore. 1947).

13. *See* Walling v. Patton-Tully Transportation Co., 134 F. 2d 945, 949 (C. C. A. 6th 1943).

14. 61 STAT. 86 (1947), 29 U. S. C. A. § 251(a) 9 (Supp. 1947). SEN. REP. No. 48, 80th Cong., 1st Sess. 32-39 (1947); H. R. REP. No. 71, 80th Cong., 1st Sess. 4-6 (1947).

1. 52 STAT. 1063 (1938), 29 U. S. C. § 207(a) (1940). No employee so engaged shall be employed. ". . . (3) for a workweek longer than forty hours after the expiration of the second year from [the effective date of the section], unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ."

2. Section 13(b)(1) of the FLSA provides: "The provisions of section 7 [*supra* note 1] shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." 52 STAT. 1068 (1938), 29 U. S. C. § 213(b)(1) (1940).

Wage and Hour Administrator sued to enjoin this procedure as an alleged violation of the FLSA. The District Court dismissed the complaint, but was reversed in the Sixth Circuit.[3] On certiorari the Supreme Court held that, since safety in interstate commerce is controlling, the ICC has power over the entire classification of the carrier's drivers, who are thereby excluded from the FLSA. *Morris v. McComb,* 68 Sup. Ct. 131 (1947).

Under § 204 of the Motor Carrier Act of 1935, the Interstate Commerce Commission is charged with the power and duty of establishing qualifications and maximum hours for the employees of a common carrier by motor vehicle.[4] This power is limited to those employees whose activities affect safety of operations.[5] It is recognized in the subsequently enacted Fair Labor Standards Act, which by § 13 (b) (1) [6] specifically excepts from its wage-hour provisions the affected employees. In order for § 13 (b) (1) to be effective it is necessary to find only the existence, not the exercise, of the Commission's power.[7]

Except in the obvious cases, such as the full-duty driver at all times driving in interstate commerce, the finding of the existence of the Commission's power has admitted of difficulty, the Wage and Hour Administrator at one time contending that at least 50% of the employee's activities must affect safety of operations.[8] This view was rejected in the *Levinson* case,[9] which held that the power exists where a "substantial part" of the employee's activities affect safety. The test of substantiality is the character of the activities affecting safety, not the proportion of time spent therein.[10] Accordingly in the instant case full-time drivers and mechanics as a class are subject to the power of the Commission, though in respect to time spent only a minute portion of their duties relates to interstate commerce.

The grouping together into a class in order to obtain an average is an awkward solution to a practical problem,[11] but is clearly more conducive of economic peace [12] than the variance which would result from treating some drivers as within, and others as without, the exemption to the FLSA. The only feasible alternative, a holding that the Commission has no power with respect to the class, is suggested by the view that the FLSA, being

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3. Walling v. Morris, 155 F. 2d 832 (C. C. A. 6th 1946), the court relying on the fact that only a small amount of time was spent in interstate commerce.

4. 49 STAT. 546 (1935), 49 U. S. C. § 304(a) (1) (1940).

5. United States v. American Trucking Associations, Inc., 310 U. S. 534 (1940).

6. *Supra* note 2.

7. Levinson v. Spector Motor Service, 330 U. S. 649, 678 (1947); Southland Gasoline Co. v. Bayley, 319 U. S. 44 (1943).

8. Interpretative Bulletin No. 9, November, 1943. WAGE AND HOUR MANUAL 520, 523 (1944-1945). Earlier the Administrator was of the opinion that the exception was inapplicable to any employee who spent a substantial amount of time in non-exempt work, interpreting substantial as more than 20% of his time. Interpretative Bulletin No. 9, March, 1942, WAGE AND HOUR MANUAL 186, 189 (1943).

9. Levinson v. Spector Motor Service, 330 U. S. 649 (1947).

10. *Id.* at 674. The dissenting opinion is in accord on this point. *Id.* at 687. The *Levinson* case was agreeably received by the motor carrier industry. "It will not be necessary in the future to follow an employee around with a stopwatch in order to determine exactly what percentage of his time is spent in each phase of his activities. All that will be necessary is bona fide classification of employees." Beardsley, *Wage-Hour Law—Status of Motor Carrier Employees,* 14 I. C. C. PRACT. J. 615, 619 (1947).

11. Instant case at 136. One result of the decision is to exclude from the FLSA at least two drivers who made no trips in interstate commerce. See Mr. Justice Rutledge dissenting, at 140.

12. *Cf.* Overnight Motor Co. v. Missell, 316 U. S. 572, 576 (1942).

social legislation, should be broadly and liberally applied,[13] and its exemptions narrowly construed in the light of the statutory purposes.[14] This, however, would contravene the equally broad public policy of safety first in interstate commerce.[15] Congressional failure to modify the language of § 13 (b) (1), in response to the suggestion of the Wage and Hour Administrator, indicates an intent to give full recognition to the established safety program of the Motor Carrier Act.[16] Since the FLSA nowhere provides that the scope of this program is to be limited, and the possibility of concurrent jurisdiction between the Commission and the Administrator has been specifically rejected,[17] the soundest result under the facts appears to have been reached.[18]

Public Utilities—Conditional Approval of Securities Issue by State Public Service Commission—A public utility applied for authorization to issue securities, intending to use the proceeds for improvements and refunding debt. The New York Public Service Commission found these purposes proper,[1] but refused to approve the issue unless the company accepted certain conditions designed to remove alleged "impairments" of its property, consisting of differences between "original" and "book" cost[2] of purchased properties valued by the utility at purchase price, and a deficiency in depreciation reserves computed by the Commission on the "straight-line" basis as against the utility's "observed" depreciation.[3]

13. *See* Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, 597 (1944).

14. *See* Phillips Co. v. Walling, 324 U. S. 490, 493 (1945).

15. *See* Levinson v. Spector Motor Co., 330 U. S. 649, 661, 662 (1947), and Maurer v. Hamilton, 309 U. S. 598, 605 (1940).

16. *See* Levinson v. Spector Motor Co., 330 U. S. 649, 684, n. 27 (1947).

17. "Congress has prohibited the overlapping of the jurisdiction of the Administrator of the Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service, Congress might have done otherwise." Levinson v. Spector Motor Co., 330 U. S. 649, 661 (1947). *Cf.* Pyramid Motor Corp. v. Ispass, 330 U. S. 695, 708 (1947), and Southland Gasoline Co. v. Bayley, 319 U. S. 44 (1943).

18. "Bona fide classification of employees" (Beardsley, *supra* note 10), enforced by the judgment of fair-minded courts, provides adequate protection against deliberate violations of the FLSA based on the reasoning of the instant case. The suggestion of Mr. Justice Murphy, in his dissent at 139, that the FLSA may be avoided by occasionally sending an employee on an interstate mission, is in any practical view manifestly absurd.

1. N. Y. PUB. SERV. LAW § 69 permits the issue of securities for various enumerated purposes, ". . . provided . . . that there shall have been secured from the Commission an order authorizing such issue. . . ."

2. " 'Original cost' . . . means the cost of . . . property to the person . . . first devoting it to the public service." 5 N. Y. CODES, RULES AND REGS. 802 (1945) (uniform system of accounts for electric corporations).

" 'Book cost' means the amount at which property is recorded in these accounts without deduction of related reserves." 5 *id.* at 702.

3. "Under the straight-line method of accounting for annual depreciation, the total depreciable value [cost minus estimated scrap value] of the property is divided by the number of periods in the estimated service life of the property and the resultant figure is the periodic depreciation." Haun, *Inconsistencies in Public Utility Depreciation,* 38 MICH. L. REV. 150, 180 (1939).

"Observed" depreciation is based on a physical appraisal of the property. It "would provide only for such physical wear and decay as can be readily seen and would consist chiefly of the cost of placing the properties into good operating condition." Bauer, *The Establishment and Administration of a "Prudent Investment" Rate Base,* 53 YALE L. J. 495, 509 (1944).

The utility was required to transfer its entire earned surplus to an earmarked surplus account, remaining impairments to be made up through monthly reservations of $75,000 from income for a decade. The company was also required to accrue no less than $2,100,000 property depreciation annually. In a 3-2 decision, the determination was annulled, apparently on two grounds: (1) there was no substantial evidence of property impairments, and (2) if there were, the Commission lacks power to condition its approval of a proper request on correction of past errors affecting valuation. *Rochester Gas and Electric Corp. v. Maltbie,* 9 LAW REP. NEWS No. 17, p. 2 (App. Div., 3d Dep't, Jan. 7, 1948).

The first ground presents a facet of the longstanding controversy between commissions and utilities over valuation and depreciation methods. The New York Public Service Commission is committed to the policy of valuing utility property at original cost less accrued straight-line depreciation,[4] but its efforts to compel utilities to keep their books on this basis have been blocked by the legislature and the courts.[5] Considerable success has nevertheless been achieved through informal negotiation,[6] especially concerning the authorization of securities issues; the Commission trades its prompt approval, essential if the utility is to avail itself of a favorable investment market, for the latter's agreement to adopt the desired accounting policies.[7] And although utilities may accrue depreciation on any basis they please, in rate cases the Commission gives heaviest weight to original cost depreciated by the straight-line method.[8]

While the first ground raises highly controversial issues, the judicial attitude implicit in the second is probably more significant. Orthodox statutory construction supports the conclusion that the Commission exceeded its powers,[9] and apparently this court is not ready to follow the Supreme Court of the United States in its virtual withdrawal from the field of utility regulation, as indicated by the *Hope Natural Gas* de-

4. See *New York Court Condemns Straight-line Depreciation,* 41 PUBLIC UTILITIES FORTNIGHTLY 173 (1948).

5. Brief for Petitioner at 57-58 lists the Commission's unsuccessful appeals to the legislature in 1934 and 1936 for amendment of § 69 of the Public Service Law, note 1 *supra.* Attempts to prescribe depreciation methods to be used by utilities were deemed by the courts to exceed the Commission's power (under § 52 and § 66, subd. 4 of the Public Service Law) to establish uniform systems of accounts in People *ex rel.* New York Rys. Co. v. Public Serv. Comm., 223 N. Y. 373, 119 N. E. 848 (1918) and New York Edison Co. v. Maltbie, 271 N. Y. 103, 2 N. E. 2d 277 (1936). Following each of these cases, the Commission repeatedly requested that it be granted power to control utility accounting policies, but without result (see Brief for Petitioner at 42-43, 54-56).

6. *E. g.,* surplus account adjustments have been made by Consolidated Edison Corp. of N. Y. and Niagara Hudson Power Corp. following negotiations, the effect of which was to reduce the net depreciated valuation of their properties by $162,565,000 and $85,000,000, respectively. Ely, *The Controversy Over Original Cost,* 40 PUBLIC UTILITIES FORTNIGHTLY 108, 109 (1947).

7. See 2 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 104 (1942).

8. See 2 *id.* at 76-77. N. Y. PUB. SERV. LAW § 114 authorizes the Commission to set temporary rates based on original cost of utility property less accrued depreciation.

9. While other sections of the Public Service Law (*e. g.,* § 70, Transfer of franchises or stocks; § 110, Control of holding companies and of transactions between affiliated interests; and § 114, Temporary rates) state that action shall be taken by the Commission when the public interest so requires, no such criterion appears in § 69, which controls the instant case. This court has in the past interpreted § 69 more liberally. *See* Staten Is. Edison Corp. v. Maltbie, 263 N. Y. 209, 213, 188 N. E. 713, 714 (1934); Public Serv. Comm. v. New York and Richmond Gas Co., 244 App. Div. 398, 403, 279 N. Y. Supp. 824, 829 (3d Dep't 1935) ("Unquestionably it was the legislative intention . . . to protect not only utility corporations and their stockholders, but primarily the investing public.").

cision.[10] Similarly, the court cited the *McCardle* case[11] as rejecting the use of straight-line depreciation, although the method was later employed in the *Lindheimer* case[12] without objection. As a practical matter, the instant decision would appear to defeat the very purpose for which the Commission was created. Assuming, *arguendo,* that the Commission's function is limited to protecting consumers, it does not follow that it should ignore the interests of prospective investors,[13] favoring instead the present holders of securities which represent overstated values. Consumers' interests are best served by a policy which encourages the flow of new capital required for the continued effective operation of utility enterprises. If the property valuation as stated by the utility's prospectus substantially exceeds its rate base, securities purchasers will receive disappointingly low returns, and future investors will place their funds elsewhere. Valuation for capitalization cannot be divorced from valuation for rate-making.[14] It is therefore difficult to perceive why the court said that the conditions imposed by the Commission were extraneous, or why the Public Service Law need be so rigidly construed as to require approval of any securities issued for a statutorily proper purpose, regardless of "whatever cracks might appear in the capital structure"[15] of the issuing corporation.

Unauthorized Practice of Law—Title Insurance Companies May Draft Such Legal Instruments as Are Incidental to the Business of Insuring Titles—Defendant title insurance company, for compensation, prepared various instruments relating to the transfer of interests in land. Plaintiff Bar Association[1] sought to have these activities enjoined as violative of the Pennsylvania statute which declares it to be unlawful for "any person, . . . , or corporation, . . . , to practice law, . . . , without having first been duly and regularly admitted to practice in a court of record in any county of this Commonwealth. . . ."[2] The court held that, since the acts complained of were done as an incident of the primary business of the defendant, no injunction could issue. *LaBrum v. Commonwealth Title Co. of Philadelphia,* 358 Pa. 239, 56 A. 2d 246 (1948).

"Practice of law," broadly defined, includes the preparation of all "legal" instruments and the giving of advice relating to "legal" matters,

10. Federal Power Comm. v. Hope Natural Gas Co., 320 U. S. 591 (1944). The implications of that case are ably discussed by Welch, *Status of Regulatory Commissions under the Hope Natural Gas Decision,* 32 GEO. L. J. 136 (1944).

11. McCardle v. Indianapolis Water Co., 272 U. S. 400 (1926).

12. Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151 (1934).

13. Quite apart from the question as to whether it is the Commission's function to protect investors, it is evident that investors do in fact treat approval of a securities issue as a guaranty of the issue's soundness. See IGNATIUS, FINANCING OF PUBLIC SERVICE CORPORATIONS 325-327 (1918); MEAD, JEREMIAH AND WARRINGTON, THE BUSINESS CORPORATION 209-210 (1941).

14. See HARTMAN, FAIR VALUE (1920) for discussion of an analogous problem, valuation for purposes of purchase and sale. The author concludes, at 89, "Both parties must be governed to a large extent by the rate-making value of the property, since it limits the future return."

15. Foster, J., dissenting in instant case.

1. Plaintiffs were members of the Philadelphia Bar Association's Committee on Unauthorized Practice of Law.

2. PA. STAT. ANN., tit. 17, § 1608 (Purdon, Supp. 1946).

as well as the conduct of litigation.[3] For practical purposes such a proposition is too all-inclusive.[4] Under the Pennsylvania statute the courts have adopted two qualifications to the application of the general definition: first, where simplicity of the questioned acts precludes the need for legal skill,[5] and second, where drafting of legal instruments is done incidentally to the primary business of the draftsman.[6] In the latter test, upon which this court purportedly based its decision, there is a presupposition that the drafting of instruments which would be lawful when done incidentally to some other and primary purpose, would be unlawful when done otherwise. But the court points out that the acts in this case constitute conveyancing, which historically in Pennsylvania is an occupation apart from the practice of law,[7] and thus cannot be within the contemplation of the statute without some express prohibition.[8] Therefore, this case is of doubtful authority as an example of the application of this second test. On the other hand, although the court made the flat statement that conveyancing is not proscribed by the statute,[9] it will be noted that the decision was rested upon the broader ground of the second test.[10] Thus the general proposition of the court as to conveyancing should be regarded with circumspection and read only in relation to the specific categories of persons, enumerated by the court, who traditionally engage in conveyancing, such as Justices of the Peace, Aldermen, Real Estate Brokers,[11] and, as in this case, Title Insurance Companies, all of whom in one manner or another come under state supervision.[12] It is doubtful that the court intended to indicate that any layman might with impunity engage in conveyancing as a business in itself. In addition to this, since the court ignored the simple solution of the case in favor of a test of questionable applicability, there is an implication as to the possible future policy of the court in relation to similar cases involving fields other than conveyancing.

The accepted reason of policy underlying restrictions upon the practice of law is the protection of the public from the ignorant and unscrupulous.[13] The test which the court professed to adopt fails to measure up to that standard. Obviously the incidental or primary purpose for which an instrument is drafted is not necessarily material to the competence or integrity of the draftsman,[14] but it is material as an indication of the practical requirements of business efficiency in a particular business. It is ap-

3. *See In re* Duncan, 83 S. C. 186, 189, 63 S. E. 210, 213 (1909); Child v. Smeltzer, 315 Pa. 9, 13, 171 Atl. 883, 887 (1934); BL. LAW DICT. 1394 (3d ed. 1933).

4. *See* People v. Title Guaranty & Trust Co., 227 N. Y. 336, 380, 126 N. E. 666, 670 (1919); Ashley, *The Unauthorized Practice of Law*, 16 A. B. A. J. 558, 559 (1930); for a suggestion that such a definition covers areas outside of the regulatory powers of the courts, see 95 U. OF PA. L. REV. 219 (1946).

5. Shortz v. Farrel, 327 Pa. 81, 92, 193 Atl. 20, 30 (1937); *see* also Blair Motor Carrier's Service Bureau, 40 Pa. D. & C. 413, 422 (1941); *In re* Eastern Idaho Loan and Trust Co., 49 Idaho 280, 285, 286, 288 Pac. 157, 159 (1930).

6. Childs v. Smeltzer, 315 Pa. 9, 14, 171 Atl. 883, 887 (1934); instant case at 242, 56 A. 2d at 249.

7. Watson v. Muirhead, 57 Pa. 161 (1868); Bodine v. Wayne Title Co., 33 Pa. Super. 68 (1906).

8. Instant case at 241, 56 A. 2d at 248.

9. *Ibid.*

10. *Id.* at 243, 56 A. 2d at 250.

11. *Id.* at 241, 56 A. 2d at 248.

12. Particularly in relation to real estate transactions, see PA. STAT. ANN., tit. 63, §§ 436.1, 436.2 (Purdon, 1941), § 437 (Purdon, Supp. 1946); see also General Incorporation Act of April 29, 1874, Pub. L. No. 73.

13. *See* Opinion of the Justices, 289 Mass. 607, 614, 194 N. E. 313, 320 (1935). See also Kephart, *The Unauthorized Practice of Law*, 40 DICK. L. REV. 225 (1936).

14. *See* Merrick v. American Security & Trust Co., 107 F. 2d 271, 277 (App. D. C. 1939).

parent, therefore, that this policy reason has given way to a recognition of the demands of business expedience. Increase of government regulation of individual and business affairs has brought a corresponding increase of public demand for cheap, readily accessible guidance in matters which are at least technically "legal." [15] The lawyer, hampered by a rigid code of ethics which prohibits advertising, among other things,[16] has been unable to respond to this demand as well as the layman, not similarly handicapped.[17] The policy manifested in the instant case seems to foreshadow a liberal attitude toward lay agencies which provide the public with needed services that are technically "legal" in their nature, but properly incidental to a primary business.

United States, Interstate Commerce Commission—Motor Carrier Purchase and Control—Railroad Affiliation—The Continental Bus System, Inc., the Dixie Motor Coach Company, and the Santa Fe Trail Transportation Company, three motor carriers operating extensively between Texas and California, proposed to transfer a total of about ten million dollars worth of assets to the Transcontinental Bus System, Inc., a corporation formed expressly to effect their consolidation. Transcontinental agreed in return to issue its capital stock to each of the three in proportion to their various contributions. In the case of Santa Fe Trail and Dixie, the shares were to be issued directly to the corporations. Continental, however, would cease to exist as a separate entity, and the quota of stock assigned to it would therefore be divided among its eleven former shareholders. As a result of this plan, Santa Fe Trail would own 39.1% of the shares of Transcontinental, Dixie 26.9%, and the next largest shareholder 5.6%. Santa Fe Trail, a wholly owned subsidiary of the Santa Fe Railroad, was guaranteed two representatives on the nine-man board of directors. In approving this consolidation [1] the Interstate Commerce Commission ruled, *inter alia,* that Transcontinental would not be affiliated with a railroad so as to make applicable the proviso of § 5 (2) (b) of the Act [2] requiring special findings of fact in the event

15. The number of individual federal income tax returns in 1936 was 2,880,990. Philadelphia Inquirer, April 20, 1938, editorial page. In 1947 there were 48,500,000 individual federal income tax returns. Letter from the Department of Internal Revenue to the Philadelphia Inquirer, Jan. 25, 1948.

16. THE CANONS OF PROFESSIONAL ETHICS, adopted by the American Bar Association, Sept. 30, 1937. See Canon 27 specifically.

17. Llewellyn, *The Bar's Troubles, and Poultices—And Cures,* 5 LAW & CONTEMP. PROB. 104 (1938).

1. Under the Interstate Commerce Act all mergers between carriers of any type must be approved by the Commission, 54 STAT. 899, 905, 49 U. S. C. § 5 (1940).

2. *"Provided,* That if a carrier by railroad subject to this part or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

§ 5(6) reads as follows: "For the purpose of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier, . . . it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

of such affiliation. *A. C. Allyn and Company, et al.—Control; Transcontinental Bus System, Inc.,—Control—Continental Bus System, Inc., et al.*, Doc. No. MC-F-3504, Feb. 10, 1948.[3]

The instant case represents a significant departure from previous rulings concerning the scope of the proviso involved. It is true that an equal or greater percentage of railroad ownership has been held not to constitute affiliation in the past, but in each of these former situations actual legal control could be found to exist elsewhere.[4] The theory relied on was that so long as a motor carrier held 51% of the voting shares, affiliation with a railroad was impossible,[5] and even this doctrine was at times repudiated.[6] Santa Fe Trail, however, will be the largest single shareholder of Transcontinental—a factual distinction which would appear to be of considerable importance.[7] Indeed, it is difficult to draw any logical line between the present decision and a holding that the proviso will apply only when control is shown to exist in the railroad, and it may well be argued that the Commission has construed the meaning of "affiliated therewith" virtually to extinction.[8]

The danger of complete circumvention of the Congressional intent of prohibiting rail domination of the motor carrier field,[9] becomes even more apparent when the result of the instant approval is examined in the light of the background of Santa Fe Trail. In authorizing the original acquisition by that company of the assets which it now intends to transfer to Transcontinental, the Commission ruled that a showing by the subsidiary of the railroad that there was inadequate transportation in the area proposed to be served was sufficient to satisfy the requirements of the

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3. Division 4 had approved the transactions in a ruling handed down December 9, 1947, and the case came before the entire Commission on a petition for reconsideration. Commissioner Miller, who had dissented from the decision below, and Commissioner Aitchison wrote separate concurring opinions advocating the inclusion in the instant order of a requirement that Santa Fe Trail put its shares in trust and give up its representation on the board of directors.

4. All cases cited by the Commission, including those in the Division 4 order, sheets 21, 22, and those of the instant opinion, sheet 5, were situations of this type. Mergers involving 49% railroad control have been approved in the past without applying the proviso: *e. g.*, Richmond Greyhound Lines, Inc.—Control—Peninsula Transit Corporation, 5 M. C. C. 394 (1938), 35 M. C. C. 555 (1940), 36 M. C.C. 747 (1941). This case and many of those cited by the Commission were decided under the Motor Carrier Act of 1935, 49 STAT. 543, 555-556 (1935), but the statutory test of affiliation was identical, 48 STAT. 218 (1933).

5. For an early pronouncement of this rule see Southwestern Greyhound Lines, Inc.—Purchase—R. W. Lee, 25 M. C. C. 195, 196 (1939).

6. Southwestern Greyhound Lines, Inc.—Merger—Arkansas Motor Coaches, Limited, Inc., 39 M. C. C. 243 (1943).

7. The test under § 5(6) is whether ". . . it is reasonable to believe that the affairs of any carrier . . . will be managed in the interest of such other carrier." The Commission has previously ruled that this does not mean solely or even principally in the interest of such other carrier. Richmond Greyhound Lines, Inc.—Control —Peninsula Transit Corp., 5 M. C. C. 394, 398 (1938). Thus the presence or absence of legal control by a motor carrier is of the utmost significance.

8. Since the proviso contains both "controlled by" and "affiliated therewith" a holding that only control will make it applicable is a holding that "affiliated therewith" is superfluous. *Cf.* Richmond Greyhound Lines, Inc.—Control—Peninsula Transit Corp., *supra* note 7 at 397.

9. See 79 CONG. REC. 5655, 12206 (1935) for statements to this effect concerning § 213(a) of the Motor Carrier Act, 49 STAT. 543, 555, 556 (1935). Despite the change from "promote the public interest" to "consistent with the public interest" when the section was incorporated into the Interstate Commerce Act, the purpose of the proviso remains the same, 86 CONG. REC. 10188, 11546 (1940).

proviso [10]—a piece of statutory interpretation as questionable as that in the present order.[11] Thus by stretching the meaning of § 5 (2) (b) both ways simultaneously, in cases concerning the same carrier, the Commission has permitted the Santa Fe Railroad to attain its present position of powerful influence in a competing transportation industry.[12] Some explanations of this liberal consolidation policy may be found in economic theory that integration is in the long run beneficial to the country as a whole,[13] and the contention that the section under discussion is inconsistent with the Act's general purpose of establishing a strong national transportation system is a plausible one.[14] But in view of intimations by the Supreme Court that the proviso must be construed in the light of the legislative purpose behind it,[15] it is doubtful whether even the strongest policy considerations can justify the instant decision.

10. "Although the bus operation north of Flagstaff here involved cannot be said to be in territory parallel and adjacent to a railroad, such operation for the most part penetrates territory not served by other transportation agencies." Santa Fe Trail Stages, Inc.—Control—Central Arizona Transportation Lines, *et al.*, 1 M. C. C. 225, 231 (1936). See Santa Fe Trail Stages, Inc.—Control—Rio Grande Stages, Inc., 5 M. C. C. 17 (1937); Santa Fe Trail Transportation Co.—Control—Western Transit Co., 5 M. C. C. 81 (1937); and Santa Fe Trail Transportation Co.—Merger—Santa Fe Stages, Inc., *et al.*, 5 M. C. C. 324 (1937).

11. Up until the decisions listed in note 10 *supra* the substantive requirements of the proviso as established by Pennsylvania Truck Lines, Inc., Acquisition of Control of Barker Motor Freight, Inc., 1 M. C. C. 101 (1936), restricted motor carrier control by railroads to lines "auxiliary and supplementary" to the railroad. For a discussion of this doctrine and its ultimate expansion, see Meck and Bogue, *Federal Regulation of Motor Carrier Unification,* 50 YALE L. J. 1376, 1408-1418 (1941). See Interstate Commerce Commission v. Parker, 326 U. S. 60 (1945). Although the Commission was there upheld it would appear that the Court considered the *Barker* test as the one to be applied, p. 70, n. 5. See also the dissenting opinion of Douglas, J., at page 75.

12. It is interesting to note that Senator Shipstead in a speech opposing the change in the wording of § 213(a) during the debate on the Transportation Act of 1940 specifically mentioned the Santa Fe Railroad as one which was seeking motor carrier domination. 86 CONG. REC. 11637 (1940).

13. The railroads propose this as the only practical solution to the transportation problem. Wall Street Journal, Sept. 11, 1943, p. 1, col. 6; DRAYTON, TRANSPORTATION UNDER TWO MASTERS 54-82 (1946). On the other hand the American Trucking Association has gone on record as opposing integration, 11 I. C. C. PRACT. J. 140, 331 (1943). See WIPRUD, JUSTICE IN TRANSPORTATION 34-37, 69, 140 (1946). WATERS, COMPETITION IN TRANSPORTATION (1938) presents an exhaustive survey of the possible systems of regulation.

14. *See* Interstate Commerce Commission v. Parker, 326 U. S. 60, 66 (1945); Schrag, *Competing Modes of Transportation and the I. C. C.,* 94 U. OF PA. L. REV. 378, 380-383 (1946).

15. In McLean Trucking Co. v. United States, 321 U. S. 67 (1943), the Court approved a Commission finding of non-affiliation in a case where Kuhn, Loeb and Co. holding less than 1% of the voting shares outstanding had one man on a nine-man board of directors, but that the question was one for serious consideration, see pp. 73, 84 n. 21, 90-92.